MOHD AZMI GHAZALI

v.

PP

HIGH COURT MALAYA, TEMERLOH
NIK HASHIM J
[CRIMINAL APPEAL NO: 41-20-99]
18 AUGUST 1999

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Escape from lawful custody - Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 19(3) - Imprisonment of 30 months, 3 strokes of whipping & order that appellant be sent back to rehabilitation centre thereafter - Whether excessive - First time offender and plea of guilty - Whether taken into consideration - Period of imprisonment served deemed to be residence at rehabilitation centre - Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 21 - Whether 30 months' imprisonment exceeded period of residence at centre - Whether order of sending appellant back to centre unlawful*

WORDS & PHRASES: *Word 'or' before words 'to whipping' – Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 19 - Whether denotes whipping not a mandatory sentence - Whether the imposition of 3 strokes of whipping in addition to imprisonment excessive*

The appellant, a drug dependant and a resident of Pusat Serenti, Jerantut, a treatment and rehabilitation centre, escaped from the said centre. In the magistrate's court, he pleaded guilty to the charge of escape from lawful custody under s. 19(3) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (the 'Act'). The magistrate sentenced him to 30 months' imprisonment and 3 strokes of whipping, after which he ordered that the appellant be sent back to the said centre for rehabilitation. This was an appeal against the said sentence.

Held:

[1] The extent of the reduction on an account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence. Herein the magistrate imposed the maximum 3 strokes of whipping allowed by law without giving any regard to the fact that the appellant was a first offender and had pleaded guilty.

[2] The first choice of punishment under s. 19(3) of the Act is imprisonment, and by the usage of the word 'or' before the words 'to whipping' in the said section, whipping is not a mandatory sentence. Therefore, to impose

the maximum 3 strokes of whipping in addition to imprisonment was manifestly excessive and unsuitable to the facts of this case.

[3] Section 21 of the Act clearly states that the period of any imprisonment served shall be deemed to be residence at the said centre. Under s. 6(1)(a) of the Act, the appellant could be ordered to reside at the said centre only for a period of 2 years. Therefore, at the end of the 2½ years of the imprisonment, the appellant could not be ordered to be sent back to the said centre as his supposed 2-year period of residence at the said centre had already been spent and completed while he was serving the 2½ year sentence in prison.

[30 months' imprisonment affirmed; whipping reduced to 1 stroke; order that appellant be sent back to centre for rehabilitation be set aside.]

Case(s) referred to:
Mohamed Abdullah Ang Swee Kang v. PP [1988] 1 MLJ 167 ***(refd)***

Legislation referred to:
Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 6(1)(a), 19(3), 21

The appellant in person
For the PP - Iskandar Ali Dewa, DPP

Reported by Sherin Kunhibava/Usha Thiagarajah

JUDGMENT

Nik Hashim J:

Introduction

The appellant, a drug dependant, was ordered by way of an order in Borang 3 for detention for treatment and rehabilitation ('the order') by the learned magistrate to undergo treatment and rehabilitation for a period of two years at Pusat Serenti Jerantut ('the Centre') and was further ordered "selepas itu menjalani Jagaan Lanjutan mengikut peruntukan-peruntukan Akta" under s. 6(1)(a)of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (the Act).

Whilst serving the detention for about seven months, the appellant on 12 February 1999 bolted from the Centre, but was arrested six days after the escape. He pleaded guilty to the charge of escaping from lawful custody while he was resident at the Centre, an offence punishable on conviction to imprisonment for a term not exceeding five years or to whipping not exceeding 3 strokes or to both under s. 19(3) of the Act.

Appeal Against Sentence

On being satisfied that the appellant understood the nature and consequences of his plea of guilty without qualification against the offence charged, the learned Magistrate, after hearing the mitigation pleas by the appellant, recorded the conviction and **sentenced the appellant to 30 months' imprisonment and 3 strokes of whipping and thereafter "beliau juga diperintahkan dihantar semula ke Pusat Serenti Jerantut untuk pemulihan setelah selesai hukuman"**. This means that after serving the sentences of imprisonment and whipping, the appellant was also ordered to be sent back to the Centre for rehabilitation.

Decision

Before me, the appellant, who was unrepresented, claimed that the sentence was too harsh and asked the 3 strokes of whipping be reduced. Having considered the arguments from both sides, I allowed the appeal. In respect of whipping, I reduced it to 1 stroke, and the order of sending the appellant back for rehabilitation after serving the imprisonment was set aside. With regard to 30 months' imprisonment, I found the sentence was not manifestly excessive. Hence, I affirmed the sentence. To my mind, the imposition of maximum 3 strokes of whipping and the order of sending the appellant back to the Centre for rehabilitation after serving the term of imprisonment are not justified and erroneous in principle, and therefore, they must be set aside.

In this particular case, the learned Magistrate had imposed the maximum 3 strokes allowed by law without giving any regard to the fact that the appellant was a first offender and had pleaded guilty to the charge.

It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence (per Mohamed Azmi SCJ in *Mohamed Abdullah Ang Swee Kang v. PP* [1988] 1 MLJ 167 SC). The above principle has been consistently followed by the courts in respect of pleading guilty cases. It would appear from the record that the learned Magistrate did not direct his mind to this well-established principle when he imposed the maximum strokes of whipping on the appellant.

Moreover, the first choice of punishment under s. 19(3) is imprisonment, and by the usage of the word "or" before the words "to whipping" in the section, whipping is not a mandatory sentence.

Therefore, to impose the maximum 3 strokes of whipping on the appellant in addition to imprisonment is, in my view, manifestly excessive and indeed unsuitable to the facts of the case. Even although the act of escaping from lawful custody is a serious offence which must be dealt with seriously,

nevertheless I consider 1 stroke of whipping besides 30 months' imprisonment is sufficiently deterrent in the circumstances of this case.

Section 21 Of The Act

Now I come to the Magistrate's order of sending the appellant back to the Centre after serving the 30 months' imprisonment. This order is unlawful, being contrary to s. 21 of the Act which states –

> (1) Where a person who is undergoing residence at a Rehabilitation Centre ..., is sentenced by any court to any term of imprisonment ..., such imprisonment ... shall take precedence over the residence..., and **the period of imprisonment ... served shall be deemed to be residence at a Rehabilitation Centre** ...., and if upon completion of such period of imprisonment... there still remains unexpired any portion of the period for which he had been ordered to reside at a Rehabilitation Centre ... he shall be required to reside at a Rehabilitation Centre ... for such unexpired portion thereof.
>
> (2) The foregoing provision of this section shall not apply to a person who is admitted to a Rehabilitation Centre under section 8 or 9. (Emphasis added)

The above provisions are clear in that the period of any imprisonment served shall be deemed to be residence at the Centre. Thus, s. 21 is applicable to the present case. The learned Magistrate had obviously overlooked the section and hence had committed a serious error of law when he made the order. This order should not be confused with the earlier order, "selepas ini menjalani Jagaan Lanjutan mengikut peruntukan-peruntukan Akta" which was properly imposed under the then provision of s. 6(1)(a) which has now been amended. In the instant case, the appellant was sentenced to 2½ years, *ie*, 30 months' imprisonment, thus exceeding the detention order of two years for treatment and rehabilitation made by the learned Magistrate in Borang 3. Therefore, at the end of the 2½ years imprisonment, the appellant (who did not fall under s. 8 or s. 9 as he was not a volunteer to be admitted at the centre), cannot be ordered to be sent back to the centre as his supposed two year period of residence at the centre had already been spent and completed while he was serving the 2½ year sentence in the prison. Therefore, the 2½ years imprisonment served shall be deemed to be residence at the centre. But under s. 6(1)(a) of the Act, the appellant can be ordered to reside at the centre only for a period of two years and in this case, he has another 17 months more to complete the residence at the centre after having resided there for seven months before his escape. Thus, by serving the 30-month imprisonment, the remaining 17 months' residence at the centre is deemed served. Since there is no more unexpired period left for which he had been ordered to reside at the centre, the learned Magistrate cannot send the appellant back to the centre for

rehabilitation. The order has no legal basis. Accordingly, the order of the learned Magistrate **"beliau juga diperintahkan dihantar semula ke Pusat Serenti Jerantut untuk pemulihan setelah selesai hukuman"** cannot stand and must therefore be set aside.

To that extent the appeal is allowed.